NO. 18217 and 18293
In The
UNITED STATES COURT OF APPEALS
For The Ninth Curcuit

Construction, Production & Maintenance Laborers Union Local 383, AFL-CIO, and United Brotherhood of Carpenters and Joiners of America, Local 1089 AFL-CIO, Petitioners,

vs.

National Labor Relations Board, Respondent

and

Independent Contractors Association, Petitioner

vs.

National Labor Relations Board, Respondent

Brief For

INDEPENDENT CONTRACTORS ASSOCIATION IN CAUSE NO. 18293 IN SUPPORT OF PETITION TO REVIEW AND MODIFY AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTIONAL STATEMENT

This case is before the Court upon two separate Petitions for review of different portions of the same order of the National Labor Relations Board (hereinafter sometimes called the Board). The Construction, Production & Maintenance Laborers Union, Local 383, AFL-CIO, and United Brotherhood of Carpenters and Joiners of America, Local 1089, AFL-CIO (hereinafter sometimes collectively referred to as the "Unions" or individually as the "Laborers" or "Carpenters") have moved in Cause Number 18217 to review that portion of the Board's Order issued against them on June 26, 1962, pursuant to Sec. 10 (c) of the National Labor Relations Act, as amended (29 U.S.C.A. Sec. 151 et. seq.) (hereinafter sometimes referred to as the Act) which found them in violation of Sections 8 (b) (4) (i) (ii) (A) & (B) of the Act. The balance of the Board's Order is before the Court upon the Petition of the Independent Contractors Association (hereinafter sometimes called the Association) to review and modify a different portion of the same Order of the Board dismissing the part of the Complaint alleging that the Union's recognition picketing had violated Sec. 8 (b) (7) (C) of the Act (29 U.S.C.A. Sec. 158 (b) (7) (C). The Board's action in dismissing the recognition picketing portion of the complaint was also predicated on Sec. 10 (c) of the Act (29 U.S.C.A. Sec. 160 (c) et. seq.) In its Answer to both Petitions the Board has requested that the relief sought be denied. The Association has intervened in the Unions' Petition and both proceedings have been consolidated by Order of this Court. This Court has jurisdiction pursuant to Sec. 10 (f) of the Act (29 U.S.C.A. Sec. 160 (f)).

STATEMENT OF THE CASE

A

PRELIMINARY STATEMENT

1) SCOPE OF THIS BRIEF

In this brief the Association will address itself only to the issues raised by its Petition, requesting review of the Board's Order dismissing that portion of the Complaing before the Board alleging that the Unions' recognition picketing violated Sec. 8 (b) (7) (C) of the Act. The Association supports that portion of the Order of the Board which the Unions seek to review in their Petition. Therefore no discussion of that portion of the Board's Order of the Unions' Petition will be made in this opening brief. The questions raised by the Unions' Petition will be dealt with in a subsequent brief supporting the Board's answer to the Unions' opening brief.

In its decision the Board predicated its action in dismissing that portion of the Complaint, charging the Unions with having picketed for more than a reasonable period of time permitted under the statute, solely on the grounds that there was "no evidence" and "no probative evidence" in the record to establish that in picketing the Colson & Stevens Construction Co. (hereinafter sometimes referred to as the "Employer"), the Unions were engaged in joint action or were acting on behalf of each other. Had the Board found that the Unions were engaged in joint action or acting on behalf of each other, they would have found that the picketing of the employer exceeded the maximum 30-day period permitted by the Act, Sec. 8 (b) (7) (C). Accordingly they then would have found and concluded that both labor organizations by such conduct violated Sec. 8 (b) (7) (C) of the Act. This brief will discuss the insufficiency of the evidence to support the Board's

negative findings and conclusions regarding the joint and concerted nature of the Unions' picketing conduct.

DESIGNATIONS OF THE RECORD IN THIS BRIEF

The Record filed in this Court is contained in three volumes. Volume I is the pleadings and formal papers and these documents are numbered p 1 through 101. Volume II contains the designated portions of the official transcript before the Board and various pages from 1 through 430 are contained therein. Volume III contains the original exhibits introduced in the Board proceeding. Hereafter in referring to the portions of the Record references will be designated by the appropriate Roman Numeral designating the particular volume of the Record followed by the page number as follows: (II 3, 4) (II 400, 402, 410, 4-2) (III G C Ex 44, p 1).

B

THE FACTS OF THIS CASE

1) THE CONTRACT SOUGHT BY THE UNIONS

The Board found and it is undisputed that both Unions by oral demands backed up by picketing sought to have the Employer sign the same identical contract to which both Unions were signatory already. (I 55; III G C Ex 44).

This contract is referred to as the Arizona Master Labor Agreement or the Master Agreement.

The Record discloses that this was the only agreement contemplated or discussed by the parties. (I 55).

II-338); that the Unions did not contemplate changing it for this Employer (II-336-338).

The Witnesseth clause recognizes that the employers will employ large numbers of workmen represented by the various Union signatories and recites the intention of the parties to set "uniform" rates, hours and working conditions for all workmen within the jurisdiction of the signatory unions to wit:

> "WHEREAS, it is the desire of the parties to establish uniform rates of pay hours of employment and working conditions which shall be applicable to all workmen performing any work for the contractors, as such work is hereinafter defined in Article III of this Agreement." (II-G C Ex 44, p 6)

The Witnesseth clause further provides that all of the respective covenants and agreements of the parties are interdependent. The document is designed to be a unified integrated document, each clause and undertaking supporting and providing the consideration for the others. Thus it states:

> "NOW, THEREFORE, in consideration of the premises and of the respective covenants and agreements of the parties hereto, each of which shall be interdependent, IT IS HEREBY AGREED:" (III-G C Ex 44, p 6)

The coverage of the agreement extends to "all" employees of the contractors employed to perform construction work as defined in the contract, see Art. I, Sec. A thereof (III-G C Ex 44, p 6). The work covered by the agreement covers every conceivable type of construction work and is not limited to a description of the jurisdiction of each craft, see Art III (III-G C Ex 44, p 15-16).

The subcontractor clause provides that all work subcontracted by the contractors will also be accomplished pursuant to and in accordance with the terms of the Master Agreement. Thus the Agreement states:

> 'That if the Contractors, parties hereto shall subcontract construction work as defined in hereafter Article III of this Agreement, the terms of said Agreement shall extend to and bind such construction subcontract work, and provisions shall be made in such subcontract for the observance by said subcontractor of the terms of this Agreement.''(III G C Ex 44, p 7)

The contract proposes only joint recognition by the Employers of all signatory unions together. Art. II of the Agreement pertaining to recognition provides:

Art. II
Recognition and Dispatching

> 'A. That the CONTRACTORS hereby recognize the UNIONS who are signatory hereto as the sole and exclusive collective bargaining representatives of all employees of the CONTRACTORS signatory hereto over whom the UNIONS have jurisdiction..." (III-G C Ex 44, p 8)

This joint nature of the recognition accorded by the Employer's signature on the agreement is further implemented by his undertaking in Art. II, Sec. (B) (1) of the contract to obtain all of his men from the hiring hall of the Union having jurisdiction over the craft he desires. (III G C Ex 44, p 9).

Because it was contemplated that the Agreement was a joint and concerted action by the Unions they specifically provided for indemnifying themselves for any discriminatory application of the hiring hall procedures by any one of the other Unions. See Art. II, Sec. B (3) (III G C Ex 44, p 10).

The intention to act in concert in the administration of the contract is evident from Art. II, Sec. D (III G C Ex 44, p 10) which provides that a contractor who violates the hiring hall provisions as to one Union releases all the other Unions from obligations under the no strike clause, the grievance and arbitration procedure. Art. II provides:

> "A contractor who violates the provisions of this Article as to referral in the first instance shall not be entitled to protection of the provisions of Article V of this Agreement."

Further evidence of cooperation and coordination between the Unions signatory to the Master Agreement is displayed in the dispatching procedures contained in Art II Sec. E (3) (a). This section provides that preferential treatment be accorded in the hiring halls of every signatory Union to qualified employees who have worked in any one of the four basic crafts for a period of at least 60 days for an employer signatory to the Agreement.

> "Each Dispatching Office shall maintain appropriate registration lists or cards, kept in current form from day to day, and referrals will be made in the following order of preference:
>
> (a) Workmen who are properly qualified, (as hereinafter provided) whose names are properly registered, and who have been formerly employed for a period of at least sixty (60) days by any individual employers signatory

signatory to the Master Labor Agreement in a craft covered by this Agreement in the State of Arizona within the immediately preceding two (2) years. (III G C Ex 44, p 11).

The pattern of joint action and delegation of responsibility and authority between the four crafts is illustrated by the provisions of the grievance machinery contained in Art V and the safety committee set forth in Art X. (III G C Ex 44, p 18 -22; 25). The safety and grievance committees are composed of two representatives from the four signatory Unions and two from the contractors. Of necessity, therefore, two of the four Unions must delegate bargaining authority and responsibility to representatives of the other signatory crafts.

Joint action is further evidenced by the uniform and common working rules contained in Art XVI of the Master Agreement. (III G C Ex 44, p 30-38). Although the contract provides different wage scales for each craft and additional separate working rules for each craft, these items are all specifically incorporated into the general agreement and a contractor who signs the agreement binds himself to pay and abide by all of the wage rules and scales, not just those of only one craft. See Art VI of the Agreement (III G C Ex 44, p 23).

THE REQUESTS FOR RECOGNITION AND PICKETING BY THE UNIONS TO OBTAIN THE MASTER AGREEMENT

Both Unions were signatory to the same identical Master Agreement. (III G C Ex 44, p 5-6). They were both members of the Phoenix Building and Construction Trades Council (hereinafter sometimes referred to as the "Council"). (I 59)

The Employer, Colson & Stevens, is a small genera contractor located in Phoenix, Arizona. (I 25-26). The Employer employed employees within the craft jurisdiction of only two unions, namely Carpenters and Laborer (II 177). The rest of the work is sub-contracted to various specialty sub-contractors. (II 177). At the time material hereto the Employer was not signatory to any collection bargaining agreements with any Unions nor were a majority of their employees represented by any Union (II 177).

When the Carpenters learned the Employer was starting a job on a "Yellow Front" store they sent a letter to the Council charging the Employer with engaging in "unfair" competition and requested that the Council place the firm on the "unfair" list. (II 281-283). The Laborers representative, who was an officer of the Council defined the work "unfair" as meaning "unfair competition in the industry insofar as wages, prices and working conditions were concerned." (II 349, 350, 351, 356).

In accordance with their regular procedure, the Council discussed the Carpenters charge and appointed a committee to investigate it. (II 284). The Record does not disclose whether a representative of the Laborers was appointed to that committee. (II 284).

But according to one of the Committee members, the composition of the Committee usually depends upon the type of crafts employed by the Employer involved. (II 384).

The Council Commitee met with the Employer on the "Yellow Front" job on October 14, 1960, and the Carpenters' representative discussed the going along with the Union and signing of the Master Agreement with the Employer. (II 205-359). Years before the Employer had been signatory to the Master Agreement and was familiar with the terms and this was known by the Carpenters' representative. (II 359).

According to Ellison, the Carpenters' representative, the Employer refused to go along with us at this time because of the cost of converting to Union subcontractors. (II 286-359). The Council Committee reported back to the Carpenters (II 286) and thereafter on October 19, 1962, the Carpenters placed a picket on the Employer "Yellow Front" job with a sign reading:

> "Picket against Colson and Stevens, Carpenters Local 1089 wants to organize and represent the Carpenters employed." (I 17).

The Carpenters freely admitted that had the Council Committee obtained the Employer's signature on the Master Agreement on October 14, 1960, they would not have picketed the Employer. (II 328). The Board found and it is not disputed that the object of the picketing was to have the Employer sign the Master Agreement. (I 55). On November 15, 1960, the picketing was discontinued. (II 288). The Carpenters recognized they had picketed for 30 days. (II 368).

On January 10, 1961, a "Survey Committee" from the Council visited the Employers project and arranged a meeting of representatives on January 12, 1961. (II 296).

The Committee reported back to the Council and the Council members formed a Committee to meet with the Employer. (II 298). Representatives of several crafts including Carpenters and Laborers attended the meeting on January 12, 1961. (I 27). At the meeting the question of recognition was again raised. (I 27). The Employer was given copies of the Master Agreement by the Carpenters and there was discussion regarding the possibility of letting the Employer finish the "Church" job with their existing non-union sub-contractors and only requiring the Employer to convert to union sub-contractors on the other jobs remaining and future work. (II 307, 375, 387). The Carpenters asked the Employer to call them before the meeting of the Council the following Tuesday so they could obtain the Council's authorization and approval of the arrangement permitting the Employer to finish the "Church" job with non-union sub-contractors. (II 307, 375, 387).

Shortly thereafter on January 26, 1961, the Laborers commenced picketing the Employer with signs almost identical to those of the Carpenters. (I 17). Like the Carpenters, the Laborers admitted that they would not have picketed the Employer had he signed the Master Agreement. (II 422). The picketing by the Laborers ended on February 20, 1961 (I 27).

SPECIFICATION OF ERRORS

1. The Board erred in dismissing that portion the General Council's Complaint alleging violations of Sec. 8 (b) (7) (C) of the Act (I 59).

2. The Board erred in concluding that the record does not establish joint action by the Unions in picketing the Employer for recognition (I 59).

3. The Board erred in finding that there was "no evidence in this record" that either Union , in seeking recognition, was acting on behalf of the other. (I 58-59). Such finding is totally unsupported by substantial evidence, but on the contrary the substantial evidence in the Record demonstrates each Union was acting as the agent of the other and in each others behalf in seeking recognition and picketing to obtain that objective.

4. The Board erred by failing to find and conclude both Unions, by virtue of their picketing, violated Sec 8(b) (7) (C) of the Act and in failing to issue an appropriate remedial order.

QUESTIONS PRESENTED

1. Whether the provisions of the Master Agreement authorizes and empowers any signatory Union to act as the agent for each of the others in seeking recognition and establishing binding collective bargaining rights and duties with Employers.

2. Whether the Master Agreement sought by both Unions constituted a joint request for recognition.

3. Whether there is substantial evidence in the Record as a whole to support the Board's findings and conclusion that neither Union in requesting joint recognition and in picketing to achieve the identical objectives were engaged in joint action or acting on behalf of each other.

ARGUMENT

A

THE UNIONS' AUTHORITY TO ACT FOR AND ON BEHALF OF EACH OTHER IN SEEKING RECOGNITION IS CONFERRED BY THE TERMS OF THE MASTER AGREEMENT

It is apparent from an examination of the sections of the Master Agreement, in part set out in the Statement of Facts, that the Agreement contemplates only joint and immediate recognition by the employers of all of the Unions signatory thereto. Upon signing the Agreement an employer immediately becomes bound to recognize all not one of the four crafts.

Generally authority to act as an agent in a given manner will be implied whenever the conduct of the principal is such as to show that he actually intended to confer that authority. In re International Longshoremans' Union (CIO) Local 6 and Sunset Line and Twine Company, 79 NLRB No. 207, 23 LRRM 1001, 1005 (1948)

The usual elements of a joint venture are a common interest in the performance of a common purpose, a joint interest in the subject matter, a right to share in the profits and a duty to share in the losses. 48 C. J. S. Sec. 2. It is generally held that one joint venturer may be intrusted with the actual control of the enterprize without changing the status of the venture. 48 C. J. S. Sec.

In the instant case, the Unions clearly had an identical purpose, namely obtaining the Employer's signature on the Master Agreement. This identical and common purpose supplied their common interest in the subject matter of the picketing.

While each may not have had a right to control the picketing activities of the other it is apparent from their

conduct that they were impliedly intrusting each other with the conduct of their respective periods of picketing.

The terms of the Master Agreement clearly spelled out their rights to share in the benefits obtained from recognition.

The Agreement contains no qualifications limiting its application to one craft or the other. Nor is prior approval or authorization from any of the crafts necessary to bring all of the terms and conditions of the Agreement into effect, when signed by an employer. When a duly authorized representative of one of the four basic crafts requests an employer to sign the Master Agreement, by virtue of the terms of that Agreement, that representative is held out by the four basic crafts as being authorized to bind them to the rights and obligations determined by the Agreement. The only conclusion that can be drawn from the interdependent, uniform and common provisions of the Agreement is that it was the clear intention of the parties to bind an employer to recognize and bargain with all of the four basic crafts if that employer recognized or bargained with any one of them. At the very least the Agreement conferred upon the representatives of each of the signatory unions the power and authority to accomplish that task. Certainly there is no evidence in this Record indicating that the Unions denied their authority to request recognition and to bind the other labor organizations by obtaining Employers' signatures to the Master Agreement. The Agreement was and is a single package that designedly could not be separated nor was it the intention of either of the Unions who picketed the Employer herein to change it in any way.

Recognition of the other Unions was not an incidental result flowing from the signing of this Agreement. Immediate recognition of all of the signatory craft was the primary and explicit purpose of the Agreement. Moreover

B

THE UNIONS' CONDUCT IN SEEKING AND PICKETING FOR RECOGNITION DEMONSTRATES THEY WERE ACTING IN CONCERT AND ON BEHALF OF EACH OTHER

It is undisputed that both Unions sought the Employer's signature on the same identical Agreement. It is clear also from the Agreement that it offered only recognition of all four Unions as the exclusive bargaining representative for all of the employees within their respective craft jurisdiction. Apart from this the Record also demonstrate that the Unions coordinated their recognition demands through the council. For example, as a result of a contact by the Council "Survey Committee" the meeting of January 12 was arranged. At the January 12 meeting with the Employer, the Laborers and the Carpenters at the same time jointly requested recognition and the same contract from the Employer.

Had the Laborers and the Carpenters not been acting together in coordinating their activities through the Council it would not have been necessary for either the Laborers or the Carpenters to attempt to obtain approval of the Council to an arrangement that would permit the Employer to finish the "Church" job with his non-union sub-contractors. Had the Carpenters been acting solely for themselves and not in a representative capacity they would have made that decision for themselves and not waited or applied to the Council for approval for the plan.

It made no difference that the Laborers' representative may not have appeared at the October meeting with the Employer for the Carpenters protected their interests by seeking the Master Agreement. In fact, it was unnecessary for any but one member of the four crafts to seek an employer's signature to an Agreement. If the Employer signed for one union the inevitable and intended result wa

that he signed with all of the other signatory unions.

Moreover one of the Council's committee members admitted that the composition of the Council committee usually depends on the type of crafts involved in the Employer's operation. The only reasonable inference from this testimony coupled with the fact that there is no evidence to show that a Laborer's representative in fact was not placed upon the original Council committee, is that it was the intention of the Unions to work together through the Council in seeking and obtaining recognition from this Employer.

C
THERE IS NO SUBSTANTIAL EVIDENCE TO SUPPORT THE BOARD'S FINDINGS THAT NEITHER UNION WAS ACTING ON BEHALF OF THE OTHER

In reviewing orders of the Board, Courts generally respect the inference drawn by the Board from evidentiary facts which are undisputed or within the Board's power to find if "the inference is within the range of reason, although not what the Court would have chosen". NLRB v Marcus Trucking Company, (2d Cir. 1961) 286 F 2d 585, 590. In Universal Camera Corp. v NLRB, 1951) 340 U.S. 474, 71 S. Ct 456, the Supreme Court held that a reviewing court may set aside a Board order when:

> "it cannot conscientiously find the evidence supporting that decision is substantial when viewed in the light that the Record in its entirety furnishes, including the body of evidence opposed to the Board's view".

Petitioner Independent Contractors Association submits that the Board ignored and skirted the material evidence in the Record and consequently its inferences from the facts are not within "range of reason" nor is there substantial evidence to support.

its findings when viewing the Record as a whole.

In its decision and order the Board voted that the Laborers did not join in the Carpenters' request to place the Employer on the "unfair" list. This fact is not material. It is obvious both were members of the Council and there was never any evidence adduced to indicate that the Laborers did not share the view of the Carpenters that the Employer was "unfair". Apparently "unfair" really means that the Employer was not abiding by all of the terms of the Master Agreement. It would appear that the Employer was engaging in "unfair" competition insofar as all of the crafts were concerned. At any rate, the investigation of the Employer's "unfair" status was a group undertaking by the Council and an additional complaint from the Laborers would apparently add nothing more to that investigation.

The Board also attached significance to the fact that a representative from the Laborers apparently did not appear with the Carpenters and the other union representatives to request recognition from the Employer and the signing of the Master Agreement on October 14, 1960. (I 58) As previously noted in the preceding portion of this brief this fact is also not material or probative of the issue of joint action when viewed in the light of the fact that the Carpenters by seeking the Employer's recognition of the Master Agreement were thereby openly and automatically seeking recognition and benefits for the Laborers.

Next the Board concluded that there was no probative evidence that the Carpenters were requesting recognition for the Laborers. (I 58) This conclusion completely avoids the undisputed facts in the Record concerning the nature and terms of the Master Agreement, the intentions of the parties reflected therein, the knowledge of the participants as to what was

required by that Agreement and the conduct of the Unions in coordinating their activities through the Council. The only reaonsable inference to be drawn from the Carpenters' request that the Employer sign the Master Agreement is that they were not seeking recognition solely for themselves but for all of the four basic crafts.

Neither Union presented the Employer with a separate contract covering only the craft they represented.

If the Carpenters in fact had no interest or intention to seek recognition from the Employer for both the Laborers and the other four basic crafts than their conduct in insisting on execution of the Master Agreement is tantamount to deceit. Both the Carpenters and Laborers knew that the contract thay they insisted be signed bound the Employer to recognize both of them as well as the other basic crafts. The Petitioner Association does not read the instant Record as establishing that the Unions were attempting to deceive the Employer into thinking that each of them was requesting recognition solely for themselves and not on behalf of any other union. The facts of the matter are that the Employer and all of the Unions assumed the inevitable effect of the execution of the Master Agreement, that the Laborers and Carpenters were acting on behalf of each other and that recognition of one meant recognition of all of the four basic crafts. It was because the Employer recognized this that he requested the presence of the Carpenter's representative at the January 12 meeting so that he could iron out the particular problems he knew he would have with the Union he knew he would be dealing with most frequently.

The "dispute" between the Carpenters and the Employer was that he was not signatory to the Master Agreement and not abiding by its terms. The same condition and "dispute" existed between the Employer and the Laborers.

The Board also ignored the undisputed evidence that at the second meeting of the parties on January 2, 1961, the Carpenters renewed their previous request for recognition and a contract and that the Laborers joined in that request and thereafter picketed in support of the joint request.

The evidence relied upon by the Board to support its conclusion on the joint action issue constitutes no more than a "scintilla" of evidence. The standard of "substantial" evidence requires more than that.

In view of the Record taken as a whole, the findings of the Board and their inferences from the undisputed facts on the joint action issue are not within the "range of reason" and must be reversed.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petitioner Independent Contractors Association petition to review and modify the Board's order be granted and the case remanded to the Board for the issuance of an appropriate order.

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(Appendix follows)

Appendix

Table of Exhibits

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1. G C Ex 44	Arizona Master Labor Agreement	II-203	II-204	II-20

IN THE

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REPLY BRIEF OF PETITIONING UNIONS

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REPLY BRIEF OF PETITIONING UNIONS

The Unions will confine their Reply to the Board's basic arguments that the picketing violated subsections (A) and (B) of Section 8(b)(4) of the Act. For the

sake of convenience, the unions will respond to these arguments in the same order in which the Board presented them.

I

Neither union picketed in violation of Section 8(b)(4)(A).

Without quibbling over what the court meant in the *Sand Door* case *(Local 1976, Carpenters v. NLRB,* 357 U.S. 93) by "legal radiations", the unions agree 1) that the court there held that a union could not, prior to 1959, *enforce* its hot cargo agreement with an employer by conduct which *in fact* violated the secondary boycott subsection of 8(b)(4); and 2) that this decision, to some degree, with its disclosure of the existence of "legal radiations"—"loopholes," if you must—prompted Congress to amend the Act.

However, the description given by the Board in its brief (pp. 16, 17) to these amendments is not quite accurate. Since the Board later in its brief places great emphasis on legislative history, it seems appropriate to note with some preciseness just what these amendments did do. New Section 8(e) was not enacted to outlaw agreements "to engage in secondary boycotts," but to outlaw hot cargo agreements and certain kinds of subcontracting agreements which are "secondary in nature,"—with some exceptions. And, subsection (A) of 8(b)(4) was amended to make it an unfair labor practice not only to "strike or engage in other coercive activity," but also to engage in certain apparently noncoercive activity (for example, "to induce or encourage any individual employed by any person . . . to engage in . . . a refusal" to do certain things in his

employment) with an object of "forcing or requiring any employer . . . to enter into" such agreements.

It should be kept in mind, too, that subsection (B) of 8(b)(4) was amended also to *expressly continue* the lawfulness of a primary strike or picketing.

A. *Section(8) (4) (A) does not prohibit picketing to obtain agreements described in the construction industry proviso in Section (8) (e).*

The gist of the Board's position is that the construction industry proviso allows only the making of *voluntary* agreements and that, conversely, a union may not picket to obtain such an agreement since this would involve an involuntary or coerced agreement.

To arrive at these conclusions, the Board invites the Court to abjure "slavish literalism" in interpreting this proviso and its inter-relation with 8 (b) (4) because, according to the Board, the clear literary purport of the language used "would lead to absurd and incongruous results plainly at variance with the policy of the legislation as a whole." (Bd. Brf. 27)

As was stated in the Unions' Opening Brief, the application of these sections to the facts of this case is *clear*. Resort to the intricate and complex history of this Act should, therefore, not be undertaken. If, however, this Court should determine that it is required to do so, it is respectfully submitted that the legislative history points in the same direction as the plain meaning of the language used in statutes.

It will be recalled that the Landrum-Griffin Act was the product of one of the longest sessions of a Confer-

ence Committee in the history of the Congress. The Conference Committee reconciled the differences between the Senate Bill (S. 1555) and the House Bill (H.R. 8400) which was adopted as a substitute for the Elliott Bill (H. R. 8342) which had been reported by the House Committee on Education and Labor.

The Senate Bill did not proscribe all "hot cargo" clauses. Section 707. (a) of S. 1555 as passed the Senate provided for the addition of a new subsection (e) to Section 8 of the National Labor Relations Act, as amended, which read as follows:

> "(e) It shall be an unfair labor practice for any labor organization and any employer who is a common carrier subject to Part II of the Interstate Commerce Act to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, or transporting any of the products of any other employer or to cease doing business with same." Legislative History of the Labor-Management and Disclosure Act of 1959 (hereinafter referred to as Leg. Hist.), Volume I, page 582.

Section 707. (c) of S. 1555 provided that:

> "(c) Any contract between an employer and a labor organization or its agents heretofore or hereafter executed which is, or which calls upon anyone to engage in, an unfair labor practice under Section 8 (e) of the National Labor Relations Act, as amended, shall to such extent be unenforceable and void." Leg. Hist., Volume I, page 583.

The Landrum-Griffin Bill proscribed all "hot cargo" clauses. Section 705. (a) of this Bill amended Section 8 (b) (4) of the National Labor Relations Act, as amended, to make it an unfair labor practice—

> "(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is:
>
> (B) forcing or requiring any person to cease, *or to agree to cease,* using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease, *or agree to cease,* doing business with any other person . . ." Leg. Hist., Volume I, page 681. (Emphasis added.)

Section 705. (b) (1) added a new Section 8 (e) to the National Labor Relations Act, as amended, which read as follows:

> "(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any collective bargaining contract entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void." Leg. Hist., Volume I, page 683.

Section 705. (b) (2) provided that:

(sic) "(2) Any contract or agreement between

> an employer and a labor organization heretofore or hereafter executed which is, or which calls upon anyone to engage in, an unfair labor practice under Section 8 (e) of the National Labor Relations Act, as amended, shall to such extent be unenforceable and void." Leg. Hist., Volume I, page 683.

It will be noted that Section 8 (b) (4) (A) of the Landrum-Griffin Bill did not contain the provision which is presently part of the Act. The draftsmen made it an unfair labor practice to force a hot cargo agreement by the language of Section 8(b)(4)(B) which is italicized in the quotation of that Section set forth above.

The reformulation of the draft to make the forcing of a prohibited agreement unlawful in Section 8(b)(4)(A) is first found in S. Res. 181 presented to the Senate on August 28, 1959. The Resolution amended Section 8(b)(4)(i)(ii)(A) to read as follows:

> "(A) forcing or requiring any employer or self-employed person to join any labor or employer organization *or to enter into any agreement which is prohibited by Section 8(e)."* Leg. Hist., Volume II, page 1382. (Emphasis added.)

Section 8(e) in S. Res. 181 made the execution of hot cargo clauses unlawful in the same language as that contained in the Landrum-Griffin Bill but added provisos excepting from the scope of such prohibition the building and construction industry and the apparel and clothing industry. The official Analyses accompanying S. Res. 181 stated that:

> "The hot cargo provision(s) outlaw, with certain exceptions, all express or implied agreements be-

> tween an employer and a labor organization by which the employer agrees not to do business with any other person. The proposed secondary boycott provision would forbid any strike or concerted refusal to work on goods where the object is obtaining an *unlawful* hot cargo agreement." Leg. Hist., Volume II, page 1383. (Emphasis added.)

It will thus be seen that the new drafting structure in Section 8 relating to hot cargo agreements and strikes therefor was removed from Section 8(b)(4)(B) of the Act. The intent of the new draft was made crystal clear by the above quotation from the Analyses accompanying the Resolution. Obviously, a strike to obtain a *lawful* hot cargo agreement was not proscribed by the Senate Resolution.

The above analysis of the legislative process is borne out by the following statement contained in House of Representatives Report No. 1147, 86th Congress, First Session—Statement of the Managers on the Part of the House on S. 1555:

> "The House amendment contains provisions amending the secondary boycott provisions of Section 8(b)(4) of the National Labor Relations Act, as amended. The Senate bill does not contain comparable provisions. The conference committee adopted the provisions of the House amendment with the following changes: (1) the phrase 'or agree to cease' was deleted from Section 8(b)(4)(B) because the committee conference concluded that the restrictions imposed by such language were included in the other provisions dealing with prohibitions against entering into 'hot cargo' agreements, and, therefore, their retention in Sec-

> tion 8(b)(4)(B) would constitute a duplication of language; . . .'' Leg. Hist., Volume I, page 942.

There remains the question of the effect of the language of Senator Kennedy's explanation of the Conference Report which was to the following effect:

> ''Since the proviso [for the construction industry] does not relate to Section 8(b)(4), strikes and picketing to *enforce* the contracts excepted by the proviso will continue to be *illegal* under Section 8(b)(4) whenever the *Sand Door* case (357 U.S. 93) is applicable.
>
> It is not intended to change the law with respect to the judicial enforcement of these contracts, or with respect to the legality of a strike to obtain such a contract.'' Leg. Hist., Volume II, page 1433. (Emphasis added.)

It should be noted that the reference to the *Sand Door* case is solely in the context of *enforcement* of the ''hot cargo'' clause. This, of course, is the sole holding in that case as is clearly and fully set forth in the Unions' Opening Brief. If the legislative draftsmen had inferred, as does the Board's brief, that the *Sand Door* case intimated the illegality of a strike to *secure* a hot cargo clause, that intimation would have been carried forward in the careful and informed legislative history which is characteristic of the various legislative moves made with respect to the progress of the legislation.

It should also be noted that the above-quoted statement referred to *judicial* enforceability of hot cargo contracts and the ''legality'' of strikes to secure such

contracts. It is respectfully submitted that there is nothing in the pertinent legislative history of the Act to dispute the assumption that the draftsmen of S. Res. 181 and the Conference Report believed that strikes to secure *lawful* hot cargo agreements were not unlawful. It is also respectfully submitted that the plain meaning of the Statute as supported by the legislative history discussed in this section of the brief should govern rather than the Board's self-serving statements with respect to the effect of the Board decisions prior to 1959 on the "law" as of that time. Suffice it to say, there was no court decision holding that strikes to secure lawful hot cargo agreements, were, *per se,* unlawful.*

So much for the legislative history. Now, for some of the specific arguments made by the Board which require special comment.

It is interesting to observe that the Board, at pages 19-21 of its brief, notes that Congress intended to preserve the law as it was in 1959 in the construction industry because it was necessary to avoid serious damage to the "pattern of collective bargaining in (this) industry." Yet, the very building trades study described by the Board in its brief (pages 19, 20, showed the *necessity* for the subcontractor clause as a means of establishing "a floor under competitive labor costs." But

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*It is interesting to observe that, even in the welter of confusing Board statements on the subject, there is to be found buried in the footnotes of the Board decision in *Teamsters Local 47* (1955), 112 NLRB 923, which is cited in the Board's brief, page 39, the following statement (at page 925): "Whether the union's picketing also violated 8(b)(4)(A) insofar as it sought to regulate future dealings by Bateson and McCann with such subcontractors (not as yet identified) as might refuse to meet the union's wage standards, is a question which we need not and do not decide."

if, as the Board argues, such clauses can be entered into only *voluntarily,* and if they are to be treated as the Board argues elsewhere in its Brief as *non-mandatory* subjects of collective bargaining, then it is obvious that the "well-established employers" who desire to have this floor under competitive labor costs will not have such protection very long. This is true because, while the well-established employers may be willing to *voluntarily* enter such agreements, the employers who are not well established may *not.* Accordingly, those employers who could not be *forced* by picketing to enter such agreements would be able to bid jobs on the basis of labor costs well below those established in the collective bargaining agreements, thereby drawing to themselves all of the work, while the so-called well-established employers would be priced out of the market. To presume that the well-established employers were maintaining *that* kind of a bargaining pattern in 1959 is to presume commercial insanity.

If the bargaining pattern reflected in the study referred to in the Board's Brief means anything, it means that subcontractor clauses were deemed and treated of *necessity* as *mandatory* subjects of collective bargaining. If Congress legislated the construction industry proviso to avoid serious damage to this pattern, then surely it did not reduce these agreements to the status of non-mandatory subjects of collective bargaining by banning picketing to obtain such agreements.

The Board (Bd. Brf. 22-23), in attempting to persuade this Court that a Union cannot picket to obtain a construction industry agreement, seems to mislead in drawing an analogy between the construction pro-

viso in 8(e) and the special treatment afforded the construction industry by the new Section 8(f). In this respect, the Board suggests that 8(f) deals only with "pre-hire collective bargaining agreements" and "union security provisions." In the first place, there is no pertinent connection between 8 (e) and 8 (f), and therefore any analogy is likely to be meaningless. In the second place, Section 8 (f) *also* permits agreements requiring the employer to notify the Union of job opportunities, etc., and agreements which specify minimum training or experience qualifications for employment, or which provide for priorities in employment based upon length of service, etc. These kinds of agreements are specially allowed by Section 8 (f), and surely are not matters of mere *voluntary* agreement, but are instead matters of *mandatory* bargaining. Nothing in the cases or legislative history cited by the Board hold to the contrary. Accordingly, the Board cannot properly say to this Court that Section 8 (f) permits only "voluntary agreements", nor can it say that a Union may never picket to obtain *any* of the kinds of agreements set forth in Section 8 (f). Thus, even the valueless analogy between the proviso in Section 8 (e) and Section 8 (f) becomes no analogy at all.

The Board, at pages 25 and 26 of its Brief, contends that if picketing to *obtain* the 8 (e) proviso were legal, then this would produce results inconsistent with other sections of the Act, particularly those establishing the duty to bargain in good faith concerning *mandatory* subjects of bargaining. In connection with this argument, the Board states that the subcontractor clause does not come within the scope of mandatory bargaining as defined in *NLRB vs. Wooster Div. of Borg-Warner Corp.,* 356 U.S. 342, 349. The fact is that

Borg-Warner did not remotely deal with subcontractor clauses, nor did it lay down any rule by which subcontractor clauses should automatically be declared non-mandatory subjects of collective bargaining.

The subsequently decided cases of *Local 24, Teamsters vs. Oliver,* 358 U.S. 283, *United States v. Drum,* 368 U. S. 370, and that line of cases which is cited in the Union's Opening Brief, are much more in point, and they support the argument that the subcontractor clause in question *is* a mandatory subject of collective bargaining.

By reason of the foregoing, it is respectfully submitted that the construction of Section 8(e) and 8(b)(4), as urged by the *Board,* rather than the plain meaning of these statutes as urged by the Unions, would lead "to absurd and incongruous results plainly at variance with the policy of the legislation as a whole."

B. *The subcontractor clause in the Master Labor Agreement is not an agreement to cease doing business within the intendment of Section 8 (e) of the Act.*

The Board correctly observes that Section 8 (e) must be read to cover only "secondary" activity, the test being whether a particular agreement is fairly within the intendment of Congress to do away with the secondary boycott, *District 9, Machinists v. NLRB,* (CA-DC; 1962) 315 F2d 33, 36. Thus, a contract clause basically intended to preserve the work opportunities in the unit covered by the contract is *primary* in nature, and therefore outside the scope of Section 8 (e), even though an incidental effect of the clause may be to limit the employer's freedom to do business with others. There seems to be no disagreement concerning these basic propositions.

However, *District 9, Machinists, supra,* does not stand for the proposition as suggested by the Board (Bd. Brf. 30) that the subcontractor clause is in every instance secondary in nature, and therefore, like the "hot goods" clause, within the scope of Section 8 (e). The contract involved in *District 9, Machinists, supra,* was quite *different* from the subcontractor clause involved in the instant case. In *District 9, Machinists,* the employer was required, if it contracted out any work, to give preference to shops or subcontractors "approved or having contracts with the Union." The Court ruled that this kind of agreement was not designed, as the Union claimed:

> ". . . to limit the work of employers maintaining labor standards commensurate with those required by the Union. The bare words of . . . (the agreement) do not lend themselves to such an interpretation. They fairly suggest a concurrence between the union and the Association to boycott another employer for reasons not strictly germane to the economic integrity of the principal work unit. Congress has set its face against such concurrence or agreement . . ."

> ". . . the questioned provision is not, as it could have been drafted to be, one which has work preservation as its aim, such as a provision barring all subcontracting; *nor is it in terms a provision to make certain that the subcontractee shall maintain labor standards commensurate with those of the neutral employer.* It is, rather, a provision to make certain that the primary employer is under contract with the Union or for unspecified reasons is approved by the Union . . . Thus, the neutral

employer is not to do business with any other employer which is not acceptable to the Union." (Emphasis added.)

In a very recent case, *Bakery Wagon Drivers & Salesmen, Local 484,* vs. NLRB (CA DC; May 23, 1963), ... F2d ....., 47 LC, Para. 18,278, the same Court noted that its previous decision in *District No. 9, Machinists, supra,* had held "that contracts which limit subcontracting to employers having a contract with the same Union are illegal." In *Bakery Wagon Drivers,* the Court was faced with the Union's contention that the agreement involved "merely required maintenance of equivalent working conditions." The conduct involved was a strike to *enforce* a no-subcontracting agreement against Employer A in order to solve a dispute with Employer B. The Court condemned the use of the no-subcontract clause *when so used* because it would destroy the basic premises "upon which subcontracting clauses, which prima facie violate subsection (B), are permitted, i.e., *that the Union is seeking to protect some legitimate economic interest of the employees* of . . . (employer A)". (Emphasis added.)

The distinctions between primary and secondary subcontract clauses noted in *District 9, Machinists* and in *Bakery Wagon Drivers,* supra, are entirely consistent with *Local 24, Teamsters vs. Oliver,* 358 U. S. 283, and the accompanying line of cases cited by the Unions in their Opening Brief, to the effect that unions and employers may legally agree upon matters threatening the maintenance of area wage standards and conditions or the basic wage structure and conditions established by the collective bargaining agreement.

The subcontractor clause in the instant case falls within the type of agreement approved by *Oliver* and the other cases cited in the Opening Brief. The fact that it establishes the minimum wage to be paid to subcontractor employees does not detract from its legitimacy. The distinctions to be observed are not—as the Board urges—whether the agreement in question determines wages and conditions to be observed outside the bargaining unit, but whether or not it is aimed really "at the Union's difference with another employer", *Local 636, Plumbers v. NLRB* (CA DC) 278 F2d 858, rather than at the protection of the jobs and standards of the employees in the bargaining unit. For example, a contract clause which establishes the minimum wage to be paid by a subcontractor to his employees may or may not come within the prohibitions of Section 8 (e), depending upon the purpose or object. And this is a question of fact in every instance.

That the subcontractor clause involved in the instant case is *primary* in nature and therefore not within the scope of Section 8 (e) at all, is fully developed in the Union's Opening Brief and will not be repeated here.

To the Board's comment (p. 36) to the effect that the clause is broader than the payment of wages and to the suggestion that it requires subcontractors to *recognize* the petitioning Unions, this may be answered by the observation that wages alone do not constitute the sole subject matter of collective bargaining, that there are many other factors which go into the establishment of employment standards. Further, and for the record, it should be observed that, although General Counsel alleged in the Complaint that an object of each of the Union's picketing was to "force or require Colson's subcontractors, including Riggs, Swartz,

and Haun, to recognize and bargain with Respondent Local 383, or Respondent Local 1089, or other labor organizations, as the representatives of the employees of such subcontractors," nonetheless, neither the Trial Examiner (R. 25-28) nor the Board in its Decision (R. 54-60) made such a finding. By implication, therefore, it must be deemed that this issue was determined *contrary* to the Board's allegation and to its suggestion.

By reason of the foreging, it is respectfully submitted that the Board's argument that the subcontractor clause in question is an agreement to cease doing business within the intendment of Section (e), is without merit.

II

The Union's picketing for the Master Agreement did not violate Section 8(b)(4)(B) of the amended Act.

As was stated fully in the Union's Opening Brief, (pp. 24-30) the law prior to the 1959 amendments did not, *per se,* forbid picketing to *obtain* a hot cargo agreement or a subcontract clause. Also, as stated in the Opening Brief, as well as earlier herein, Congress made it plain when it amended the Act that it understood such picketing to be legal. Congress expressly undertook to outlaw such picketing generally, and then just as expressly, exempted the construction industry where the subcontract clause related to work to be done at the jobsite. See 8(b)(4)(A) and 8(e). *LeBus v. Local 60, United Assn. of Journeymen, etc., 193 F. Supp. 392; Cuneo v. Carpenters,* etc., 207 F. Supp. 932.

Since the Opening Brief, another court has been heard from. In *Cuneo v. International Union of Oper-*

ating Engineers, Local 825, et. al., ... F. Supp. ..... (April 16, 1963), 47 LC Para. 18,229, the Union was charged, as here, with violations of 8(b)(4)(A) and (B) in connection with work stoppages arising out of *negotiations for an agreement containing a construction-industry type subcontractor clause.* After holding this conduct *not* in violation of Subsection (A) on the basis of the decision in *Cuneo v. Carpenters,* supra, the court then said:

> "Section 8(b)(4)(B) of the Act was not involved in Judge WORTENDYKE'S decision. (Cuneo v. Carpenters, Supra.) The Board claims that respondents' strike action against members of the Association *to force them to enter into a collective bargaining agreement containing a subcontractor clause,* which would require them to cease doing business with subcontractors who are not covered by such agreement, is *per se* a violation of section 8(b)(4)(B) of the Act. *The Court does not agree with this contention.* Since the proviso in section 8(e) of the Act protects under sections 8(b)(4)(A), work stoppages to obtain a subcontractor clause, such action by respondents against members of the Association cannot be unlawful under section 8(b)(4)(B) of the Act. *Otherwise, the proviso in section 8(e) would be rendered meaningless."* (Empha. added)

At the trial level of this case, the Board based its contentions of an 8(b)(4) violation on the very same *per se* argument. General Counsel elicited testimony calculated to prove that each union picketed to force Colson to sign the Master Agreement. Except for establishing the existence of the subcontractor clause in that Agreement, he made no attempt to show that the

Union had *as a matter of fact* any dispute, active or otherwise, with the named subcontractors, nor that either of the unions were picketing *with a subjective intent* to force the named subcontractors off the job.*

When the Unions sought to show the *absence* of any dispute whatsoever with the named subcontractors, General Counsel objected as to the *relevancy,* (Tr. 352) explaining that he was relying *solely* on the *per se* theory that picketing to force the execution of the agreement was a violation of subsections (A) and (B) of 8(b)(4).

This *per se* approach also represents the position taken by the Board in its subsequent decisions in other cases, in which it cites this Colson and Stevens case as the *leading authority* in this area of the law. *Los Angeles Building & Construction Trades Council,* 140 NLRB No. 124, 52 LRRM 1215.

However, the Board in its Brief (pp. 37-47) seems to be sidling off from its *per se* theory. This is reflected by the Board's citation of cases dealing with the common garden variety of secondary boycott, that is, where a neutral employer is intentionally pressured in order to resolve a dispute, active or otherwise, with some "blacklisted" employer. It is also reflected in the Board's unwarranted references to "persons in the blacklisted group," to "delisting," "blacklist," etc. There, of course, is no evidence whatsoever support-

*It will be recalled that when the Carpenters Union spoke to Colson in October and when it began picketing on Oct. 19th in order to force recognition, and arguendo, the execution of the Agreement, *so far as the Union knew*—and this is undisputed (Tr. 359)—the Colson job was *all-union* except Colson. The court is reminded further that the subcontractor clause, in any event, was *not* applicable to the subcontractors named in the complaint for the several reasons stated in the Union's Opening Brief at p. 14 et seq.

ing such characterizations. And, for the *first time,* the Board now says (Bd. Brf. 46) that its Decision "rejected" the Trial Examiner's finding that "enforcement" of the subcontractor clause was left to the future. (R. 28) In this connection, however, the Board does *not* argue nor even suggest that the picketing was accompanied with an intent by either union *to continue doing so* until the named subcontractors either agreed to abide by the Agreement or until Colson forced them off the job. In fact, the Board's argument in the context of rejecting the Trial Examiner's reasoning that *enforcement* of the subcontractor clause was left to the future, distinguishes between the "immediate objective" of signing and the "ultimate objective vis-a-vis the subcontractors," thereby itself acknowledging that *enforcement* was *in fact* left to the *future* as compared to the immediate object of getting the agreement signed.

Thus, logically, the Board must *come back* to the *per se* argument that picketing to obtain a construction-industry type of subcontractor clause, *without more,* is a violation of 8(b)(4)(B). However the cases cited by the Board in support of this proposition are all clearly disinguishable on their facts. And as has been earlier shown herein and in the opening brief, the Congress expressly and plainly declared that picketing to *obtain* construction-type subcontractor clauses, *even assuming they are secondary in nature,* is *lawful.*

Lastly, in connection with the suspicion that the Board may now also be arguing that each of the unions picketed with an illegal subjective intent directed at the termination of any contracts between Colson and any of the named subcontractors, in the manner involved in *NLRB v. Local 47, Int'l Brotherhood of Teamsters,* 234

F. 2d 296 (C.A. 5), it is respectfully submitted 1) that it is procedurally improper to so argue after having led the Unions and the Trial Examiner to believe that it was relying solely on the *per se* theory, and 2) that as a matter of fact there is not sufficient evidence supporting a finding of subjective intent, or object, on the part of either union of a kind prohibited by Subsection (B) of 8(b)(4). The lack of *specific* evidence of *unlawful motivation* is acknowledged by the reliance by the Board upon *NLRB v. Erie Resistor Corp.*, ... U.S. ....., 53 LRRM 2121, 2124. That case, dealing with a limited *evidentiary* rule in discrimination cases, is of no aid to the Board's argument in the instant case since the conditions precedent to the use of the *Erie* rule are not present in the instant case.

It is respectfully submitted that neither union's picketing for the Master Labor Agreement was in violation of Section 8(b)(4)(B) of the amended Act.

CONCLUSION

The Board's Decision and Order insofar as it declares each of the petitioning unions to be guilty of violating the two subsections of 8(b)(4) should be reversed and ordered dismissed.

Dated this 14th day of June, 1963, at Phoenix, Arizona.

Respectfully submitted,

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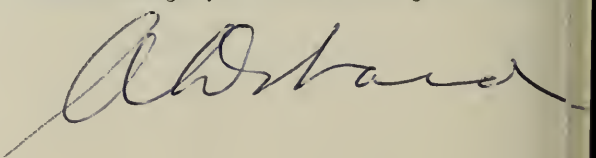

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of the United States Court of Appeals, Ninth Circuit. In his opinion, the tendered brief conforms to all requirements.

MINNE & SORENSON
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By